

ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURT

ADVISORY OPINION No. 10
(March 28, 2002)

"PRACTICE OF LAW" BY SENIOR JUDGES

The Code of Judicial Conduct contains a partial exemption for senior judges from the rule that otherwise prohibits judges from practicing law. The partial exemption is misleading, however, if read in isolation. In this opinion, the Advisory Committee addresses the issue of the practice of law by senior judges and sets forth a number of significant cautionary considerations under the Code of Judicial Conduct. Our views on this matter were recently transmitted in a report to the Joint Committee on Judicial Administration and are incorporated for wider dissemination into this advisory opinion. As we put it in that report: "[W]e believe that the application of these overarching principles [contained in the Code of Judicial Conduct] impose serious and significant limitations on any such practice.... We deem it highly advisable to alert all senior judges to the potential obstacles in any decision to practice law under the exemption and our present views with respect thereto."

As background, the present Code of Judicial Conduct was adopted by the Joint Committee on November 7, 1994, with an effective date of June 1, 1995. It establishes standards for ethical conduct of active and senior judges and of magistrate judges in our court system, subject of course to the overarching ultimate authority of the District of Columbia Commission on Judicial Disabilities and Tenure (the "Commission").

As set forth in more detail in its Preface, the Code was "the product of careful deliberations over nearly a four-year period incorporating the views of all judicial officers concerned." The files of our Committee, which spearheaded the drafting process, show that the applicability of the Code provisions to senior judges received careful attention. In our limited review, coming within less than a decade later, we accepted the basic overall structure of the statute and Code establishing the structure of senior judge service, including that of "senior judge, inactive." So far as we are aware, that structure has to date by and large worked well and served a basic purpose, as expressed in a commentary in the Application Section D: "The judicial system of the District of Columbia will significantly benefit from the availability of as many active senior judges as possible."

Our report to the Joint Committee was prompted by suggestions emanating from members both of the Joint Committee and of the Commission that a review of the Application section of the Code and the exemptions provided therein for senior judges would be in order as the number of senior judges in both courts continues to rise and experience with the status of such senior judges grows. In particular, we were asked to consider the present exemption of senior judges from Section 4(G), which provides that "a judge shall not practice law," with very limited exceptions (acting pro se and, without compensation, giving legal advice to and drafting or reviewing documents for a member of the judge's family). The Year 2000 Annual Report of the Commission, quoted in the discussion below, further highlighted the relevance of this latter inquiry.

Our attention, therefore, focused upon Application Section C. That section, as recently amended to correct a drafting error, provides:

"C. A senior judge

(1) is not required to comply:

(a) except while serving as a judge, with Section 3(B)(9); and

(b) at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, and 5B(2).

(2) shall not practice law in the court on which the judge serves or in any court or administrative agency subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a

proceeding in which the judge has served as a judge or in any other proceeding related thereto."

An examination of the exemptions provided for senior judges will demonstrate the normal expectation that senior judges may well engage in a wide range of activities beyond their part-time judicial service, contrary to the limitations on such activities imposed upon full-time judges presumably to avoid drains on their time and energy and to minimize possibilities of conflict of interest. Seniors judges thus may, generally speaking, be active in business enterprises, serve in other governmental capacities, act as fiduciaries, and serve as arbitrators and mediators. Also included in the list of exempted limitations is that prohibiting a full-time judge from the practice of law.

As already mentioned, questions have been raised as to the scope and application of this last-mentioned exemption. Notably, the Year 2000 Annual Report of the District of Columbia Commission on Judicial Disabilities and Tenure sets forth the following as part of the report:

"V. AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

"During the fiscal year the Commission received a request from a senior judge to assume inactive status, for the purpose of commencing the practice of law. The Commission took the matter under advisement, and had several discussions with the judge concerning the scope of the practice. After a thorough review of the

provisions of the Code concerning the activities of seniors judges, the Commission concluded that the Code as adopted by the Joint Committee on Judicial Administration for the District of Columbia Courts, does allow inactive senior judges to practice law, with the only prohibition being the practice of law before the Court on which the senior judge serves. The Commission advised the senior judge of its determination, and required certain measures be undertaken to ensure that the practice would be consistent with provisions of the Code, particularly Canon 2B, which prohibits a judge from lending the prestige of judicial office to advance his or her private interests or the private interests of others.

"After much thought and discussion, the Commission is unsettled by the appearance and the fact that senior judges can practice law as provided in the present Code. As a result, a subcommittee of the Commission met with Chief Judge Annice Wagner and members of the Joint Committee to discuss the Commission's concerns, and possible amendments to the Code to restrict and redefine the scope and extent to which senior judges can engage in the practice of law."

Looking back to the history of the adoption of the current exemption in 1995, the Advisory Committee's February 9, 1994 memorandum mentioned above discussed the retention of this exemption as follows:

"[A]pplication C(I)(b) of the Code generally would exempt senior judges from Canon 4G, which bars judges from practicing law (except pro se and for the judge's family), whereas in limitation of that exemption Application C(2) says a senior judge shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves. We have added to Application C(2) a prohibition against practicing law in any administrative agency subject to the appellate jurisdiction of the court on which the senior judge serves. Taken together, Applications C(1) and C(2) (as amended) would permit a senior judge to practice law, for example, in Maryland and Virginia and in the federal courts of the District of Columbia, Maryland, and

Virginia, during a period when that judge is eligible to sit as a senior judge in the District of Columbia court system. These exemptions reflect the approach of Compliance A(1) & (2) of the 1972 Code now in effect."

The Advisory Committee then included this cautionary note:

"Obviously, a senior judge would have to use good judgment if he or she chooses to practice law in another jurisdiction (including the D.C. federal courts) during a period that comes close in time to periods of service as a judge in this jurisdiction. Conceivably, there may be an "appearance of impropriety" that could be troublesome even though the senior judge literally complies with the rules discussed above. Perhaps Advisory Opinion No. 3 (June 25, 1992), "When Senior Judges May Act as Arbitrators," issued by the Advisory Committee on Judicial Conduct of the District of Columbia Courts, will provide some guidance by analogy. In any event, despite obvious concerns, we see no reason to recommend reversal of a judicial ethics policy about retired or senior judges practicing law that currently is in effect under the 1972 Code and continues under the 1990 code. Difficult questions can be addressed, when necessary, through written opinions of the Advisory Committee."

In retrospect, we think the Advisory Committee's discussion may significantly understate the problems and difficulties in the application of the exemption in our jurisdiction. Unlike the other activities permitted for senior judges, the practice of law by an individual necessarily reflecting a partisan role in the legal world has the potential to clash against the image of the judge as an impartial decision-maker in the application of the law. While the Code through the exemption does not impose

a blanket prohibition against the practice of law by senior judges, they nonetheless continue to be governed by other overarching provisions of the Code, including:

"Canon 2: A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" and its subtexts A and B:

"A. A judge...shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"B....A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge...."

Canon 3: A judge shall perform the duties of judicial office impartially and diligently" and its subtext E(1):

"E(1): A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..."

"Canon 4: A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations" with its subtext A:

"A. Extra-judicial Activities in General: A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties."

It is, therefore, a serious error for a senior judge simply to take note of the exemption and its terms and proceed to engage in the practice of law. On the contrary we believe

that the application of these overarching principles imposes serious and significant limitations on any such practice. Given the long-standing existence of the exemption in the ABA Model Code and the recognition of the part-time status of senior judges, we are not prepared at this point to recommend a blanket abolishment of the exemption. We do, however, deem it highly advisable to alert all senior judges to the potential obstacles in any decision to practice law under the exemption and our present views with respect thereto. As we now view it, the most critical considerations would appear to be, in the main, the geographical location of the proposed practice, its nature, and the timing in relation to periods of actual judicial service.

For example, if the practice of law took place in a geographical area removed from the greater Washington metropolitan area (such as in a Florida retirement community) or if the practice consisted exclusively of legal work in a field totally divorced from those adjudicated by our court system (such as patent law), it is possible that no conflict with the general principles would arise in the ordinary course of events. Likewise, if the practice took place only during an extended period where the senior judge had expressly taken inactive status under

Application Section D, risk of problems would be reduced. However, as the nature of the legal practice relates to a geographical area more proximate to our court system and/or to types of law that are adjudicated therein, the possibilities of conflict can be seen to increase markedly.

Indeed, an arrangement whereby a senior judge who has not taken inactive status handles legal matters anywhere in the greater metropolitan area in a field adjudicated in our courts might raise issues of compatibility with our ethical code. The practice of law in the District and the nearby metropolitan areas of Maryland and Virginia interact in a significant way as to clients and participants. A senior judge still must be perceived as a judge, first and foremost, throughout this relatively restricted region by his or her colleagues at the bar. To deal with a senior judge on one instance as opposing counsel and on another as an impartial adjudicator would raise questions of appearance.

Even in the obviously less sensitive area of a senior judge serving as a mediator or arbitrator, a role similar to that of a judge, the Advisory Committee discussed at considerable length in its Advisory Opinion No. 3, alluded to above, the propriety of senior judges sitting in such a capacity and various factual permutations thereon, such as

whether the arbitration took place in the District or elsewhere, whether the arbitration involved matters which might eventually come before our courts, whether the judge had judicial matters under advisement at the time of serving as an arbitrator, and whether the judge had sat as a judge during the same week or month that he or she acts as a private arbitrator. The considerations discussed in that advisory opinion are plainly applicable in a heightened degree to senior judges engaged in the practice of law. In particular, we note the desirability of significant temporal segregation of an individual's role as a sitting judge and as a practicing attorney, such as concentrating the period of judicial service into a discrete period of the year, and this even in cases where the practice of law takes place apart from the Washington area or in fields exclusively federal.

We hasten to add, however, that we do not think problems in this regard can or should be met by indiscriminate resort to the status of "senior judge, inactive." As the commentary to Application D makes clear, that special status is intended to be reserved only for an opportunity to "embark on alternative career or activity explorations" and is hardly intended to become part of the woof and warp of ordinary senior status. And

as the experience with the Commission set forth in its annual report indicates, even then great care must be taken to develop a structure for the practice of law compatible with the status of "inactive senior judge" and the prospect of future judicial service.

Finally, we make note of a matter that is not within the Committee's jurisdiction but that may bear upon the subject we are addressing. The District of Columbia Court of Appeals in the exercise of its statutory and inherent authority has promulgated rules relating to the District of Columbia Bar and to the unauthorized practice of law. *See Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1125-26 (D.C. 1988); D.C. Bar Rules Preamble. In pertinent part, D.C. App. R. 49(a) provides that "[n]o person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an *active* member of the District of Columbia Bar, except as otherwise permitted by these Rules." D.C. Bar R. 11, § 4 in turn provides as follows:

Classes of membership: The members of the District of Columbia Bar shall be divided into 3 classes known respectively as "active" members, and "inactive" members....Judges of courts of record, full-time court commissioners, U.S. bankruptcy judges, U.S. magistrate judges, other persons who

perform a judicial function on an exclusive basis, in an official capacity created by federal or state statute or by administrative agency rule, *and retired judges who are eligible for temporary judicial assignment, and are not engaged in the practice of law*, shall be classified as judicial members, except that if a member's terms and conditions of employment require that he or she be eligible to practice law, then the member may choose to be an active member. Any inactive member in good standing and any judicial member who is no longer a judge may change his classification to that of an active member by filing with the Secretary of the Bar a written request for transfer to the class of active members, and by paying the dues of active members. A judicial member who is no longer a judge shall be classified as an active member if he engages in the practice of law in the District of Columbia. No judicial or inactive member shall be entitled to practice law in the District of Columbia or to hold office or vote in any election or other business conducted by the District of Columbia Bar.

It is clear that anyone who practices law in the District of Columbia for which District of Columbia bar membership is required must be an "active" member of the Bar. What is not entirely clear, perhaps, is whether a "retired judge who is eligible for temporary judicial assignment" *must* be classified as a judicial member or whether such a judge has the option to enroll as an active member if the judge wishes to "engage in the practice of law." Any clarification would be within the purview of the Court of Appeals, but it obviously would be desirable that bar membership provisions be consistent with the Code of Judicial Conduct. In any event, D.C. Bar R. II, § 4, would

not be completely determinative, since it would not apply to the practice of law in other jurisdictions nor, perhaps, to those numerous categories of practice in the District for which active membership in the District of Columbia Bar is not required under D.C. App. R. 49(c).

We express the foregoing considerations to alert both present senior judges and those considering a move to that status to the complexities behind the application of the exemption. Beyond that, we are reluctant at this point to attempt to deal with all the various permutations of the practice of law by senior judges and the limitations that the Code may place upon that activity. Our experience with actual cases is limited indeed; to the best of our knowledge, it is rare that our senior judges engage in the practice of law of any kind. At least for the time being, we suggest, in the common-law tradition, each instance presenting potential conflict should be addressed on its facts. To repeat, the principal consideration that should be in the forefront of a senior judge even considering the practice of law as part of his or her nonjudicial activities is that the exemption from the limitation of Canon 4(G) and the continuing restriction on the practice of law in the court on which the judge serves are only the beginning of the inquiry as to precisely how far and under

what circumstances that practice of law can take place in compliance with the Code as a whole.

The court system is enormously benefitted by the willingness of retired judges of this court to serve as senior judges. Appointment and reappointment to that status are, depending upon age, subject to quadrennial or biennial review both by the Commission and by the Chief Judges of our courts. Service as senior judges is optional both with the judge and with the respective Chief Judge; there is no vested right or obligation either way. Careful consideration by all parties involved of the limitations imposed by the Code should, it can be hoped, forestall potential problems posed by an election by a senior judge to practice law in any particular form. The Advisory Committee stands ready to assist to this end.